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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1955

HAROLD I. CAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the District Court is reported in 122 F. Supp. 388. The opinion of the Court of Appeals (Pet. 18-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 17) was entered on May 5, 1955. The petition for a writ of certiorari was filed on May 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was "misbehavior" in violation of 18 U.S.C. 401(2) for a defendant's attorney, without permission from the court, to submit to Government employee members of a grand jury, prior to its discharge, a questionnaire for possible use in connection with a motion for dismissal of an indictment the grand jury had returned against the attorney's client.

2. Whether such action was in an "official transaction" within 18 U.S.C. 401(2).

3. Whether the court's statement, in imposing merely a $100 fine, that it had doubts that the acts were consciously wrong, was inconsistent with the adjudication of contempt.

STATUTE INVOLVED

18 U.S.C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * * *
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> * * * * * * *

STATEMENT

Petitioner was attorney of record for one Ben Gold, who had been charged with filing a false non-communist affidavit in violation of 18 U.S.C. 1001 in an indictment returned August 28, 1953, by the May 1953 Grand Jury of the District Court for the

District of Columbia (R. 1). He was also attorney of record for Vera Taft, secretary to Ben Gold, and Pietro Lucchi, an associate of Ben Gold, both of whom had been served with subpoenas duces tecum by the same grand jury (R. 1-2). During the hearing on the motion to quash the subpoenas, held September 22, 1953, before District Judge Pine, government counsel advised the court in the presence and hearing of petitioner that the grand jury was continuing its investigation of other possible violations of 18 U.S.C. 1001.

On September 22, 1953, petitioner, in his capacity as attorney for Ben Gold, sent to the federal employees on the grand jury letters requesting them to answer and return an attached questionnaire (R. 4-5). Each letter stated that in "in the interest of the fair administration of criminal justice" the return of the questionnaire was sought "to learn the effect of the loyalty program on jurors from the Federal Government." The letter stated that it was the duty of the juror "as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case." (R. 4.) The questionnaire asked each juror such questions as whether he thought a government employee would "get into trouble" for defense of a fellow employee accused of disloyalty, for failure to drop accused acquaintances, or for reading controversial literature. It sought to discover whether the government employee was involved in a loyalty proceeding and asked whether he thought a government employee would be in difficulty by reason

of a vote to acquit or not indict a person publicized as a communist (R. 5-6). When the letters and questionnaires were brought to the attention of District Judge Pine by members of the grand jury who had received them, they were ordered impounded (R. 3).

On May 10, 1954, after completion of the trial of Gold, petitioner was directed to show cause why he should not be adjudged guilty of contempt for sending the letters and questionnaires (R. 1-8). In his answer petitioner alleged that his purpose in sending the questionnaires was to discover whether there was a basis for challenging for bias the government employee grand jurors; that decisions in prior cases had indicated that, to support such a challenge, more was needed than the mere fact of government employment; and that he was relying upon what had actually been done in the case of *United States* v. *Weinberg*, (D.D.C., Crim. No. 829-52) when he sent the questionnaire (R. 8-29).

The District Judge found petitioner in contempt (R. 32-33), stating:

> There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harrass them by challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. * * * Jurors will not serve competently if so harassed.

With respect to the argument that the court in the trial of Gold had allowed only thirty days for

motions challenging the grand jury, the court pointed out that, had there been a suggestion of need to investigate bias and a showing of good faith, the court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded." (R. 32.) The District Court added, however (R. 33):

> While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong.

For this reason, the court imposed merely a fine of $100 (R. 33).

On appeal, the judgment was affirmed (Pet. 17-32), Judge Fahy dissenting on the ground that petitioner's conduct, assumed to be misbehavior, was not "in an official transaction as an officer of the court" (Pet. 32-34).

ARGUMENT

1. In arguing that his conduct did not constitute misbehavior (Pet. 9-11), petitioner ignores the central point on which the finding of contempt rests, *i.e.*, that he approached a still active grand jury as to matters which could have a bearing on their action as grand jurors, without disclosure to or consent of the court. Both the District Court and the Court of Appeals found it unnecessary to consider the broader issues petitioner seeks to inject in the case—whether a grand jury can properly be challenged for bias or whether, if such challenge can

be made, it would justify the type of questions which were asked here. The basis of the holdings below is simply that, even assuming that under some circumstances an attorney may question grand jurors, petitioner had no right to interrogate an active grand jury without permission from the court.

As the District Court pointed out (R. 32-33), there is a vast difference between an approach to grand jurors who have completed their work and the approach in this case to grand jurors who were known to be still considering the type of case to which the questionnaire related. Petitioner argues (Pet. 11) that he could not wait until the grand jury was discharged because of the time-limit on his pretrial motions in the Gold case. But, as the District Court noted, petitioner made no showing that he had presented his dilemma to the trial court. Nor did he tell Judge Pine, who heard his motion to quash subpoenas as to matters pending before the grand jury, that he found it necessary to question the grand jurors concerning their reaction to the loyalty program. The alleged necessity for prompt action certainly does not excuse the failure to seek permission from the court before approaching the grand jury, which was not only technically in session but actually deliberating on the type of case to which the questionnaire related.

Thus, on the issue of misbehavior the narrow question is whether an attorney can be held to knowledge that he should obtain permission from the court before questioning members of an active

grand jury as to their state of mind with respect to issues which bear on the matters before them. On this question, there was no dissent in the court below. We think there can be no doubt that an attorney can properly be held to such knowledge. As this Court said in *Remmey* v. *United States*, 347 U.S. 227, 229, any private communication with a jury is presumptively prejudicial. See also *Sinclair* v. *United States*, 279 U.S. 749, 765; *Rakes* v. *United States*, 169 F. 2d 739, 745 (C.A. 4).

2. We submit that the court below was also correct in holding that petitioner was engaged in an "official transaction" when he sent his letter and questionnaire to the grand jurors. The letter itself announced in its caption that it related directly to the case of Gold, and made explicit the obvious fact that it concerned petitioner as counsel and the grand jury as accuser in this matter of official court business (R. 4). Written in his capacity as "counsel for the defendant," an officer of the court, petitioner's letter had no purpose and no meaning except as it bore precisely on the official business of Gold's indictment. The holding that such action was part of petitioner's "official transactions" as an attorney in the Gold case rests upon the plain and literal meaning of that phrase in 18 U.S.C. 401.

As the court below observed (Pet. 23-24), considerations as to what constitutes contempt "so near" the court "as to obstruct the administration of justice" are significant under subsection (1) of 18 U.S.C. 401, but are irrelevant to this case under

subsection (2). The latter provision, governing generally the conduct of the court's "officers in their official transactions", forbids "misbehavior" regardless of its geographical location. Like subsection (3), punishing disobedience of court orders without limitation as to the place where such disobedience occurs, subsection (2) supports with the power of punishment the court's essential right to insist that its officers in their official transactions behave with propriety at all times and in all places. Thus, the only issues are whether there was (1) misbehavior, (2) by an officer of the court, (3) in an official transaction. All three elements were present here.

3. The court's statement, in imposing merely a fine of $100, that it had doubts as to whether petitioner's acts were "consciously wrong" is not inconsistent with the adjudication of contempt. There is no doubt that petitioner's acts were consciously and willfully done. Evil motive is not an element of the offense. *Kelly* v. *United States*, 250 Fed. 947, 950 (C.A. 9); *Townsend* v. *United States*, 95 F. 2d 352 (C.A. D.C.); *Fields* v. *United States*, 164 F. 2d 97 (C.A. D.C.).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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